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Mercury Casualty Company

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

LOURDES GARCIA, an individual

Plaintiff,

v.

**MERCURY CASUALTY COMPANY, a
corporation licensed to do
business in Nevada, DOES I
through X, inclusive, and ROE
ENTITIES I through X,
inclusive**

Defendant

2:16-cv-01658-JCM-NJK

MOTION FOR SUMMARY JUDGMENT

Defendant Mercury Casualty Company moves the Court for summary judgment, or, in the alternative, partial summary judgment, on plaintiff Lourdes Garcia's claims pursuant to Federal Rule of Civil Procedure 56. Mercury seeks summary judgment on the following issues:

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1. There are no undisputed material facts to rebut the position that Ms. Garcia breached a condition precedent in her policy with Mercury, precluding a finding of breach of contract against Mercury;
2. Ms. Garcia has no evidence of a contractual breach of the covenant of good faith and fair dealing in support of her second cause of action, and should be precluded from asserting extra-contractual damages under the same;
3. As a matter of law, Ms. Garcia cannot recover attorney's fees as damages for her extracontractual claims;
4. There are no undisputed material facts demonstrating Mercury acted with malice, fraud, or oppression, warranting summary judgment on the issue of punitive damages.

This motion is supported by the memorandum of points and authorities, the exhibits included in the Appendix of Exhibits, and the Declarations of Lucy Collins and Benjamin J. Carman filed concurrently with this motion.

DATED this 21st day of February, 2017.

RANALLI ZANIEL FOWLER & MORAN, LLC

By /s/Benjamin J. Carman
BENJAMIN J. CARMAN, ESQ.

Attorneys for Defendant
Mercury Casualty Company

MEMORANDUM OF POINTS AND AUTHORITIES

I.
INTRODUCTION

Defendant Mercury Casualty Company spent nearly two years asking plaintiff Lourdes Garcia for medical records and releases so it could obtain medical records from her treating providers to investigate her claim for underinsured motorist (UIM) benefits. Ms. Garcia did not respond once during this period.

In fact, she remained silent for over four and a half years from her previous contact with Mercury to the date she filed her complaint. She never sent any updated records, and she never even sent complete medical billing records beyond her initial incomplete transmission.

Mercury policy with Ms. Garcia, as with nearly every other ISO-developed automobile insurance policy, contains a cooperation clause mandating the insured's cooperation with the insurer's investigation of the file. It also bears a limitation of legal actions only if the insured fully complied with the terms of the policy.

Ms. Garcia's silence and failure to cooperate with Mercury breached the cooperation clause. Coupled with a provision mandating an insured comply in full with all policy terms and conditions before filing suit, Ms. Garcia's claims of breach of contract and bad faith should be barred as a matter of law.

1 For these reasons, the Court should enter summary judgment
2 in favor of Mercury.

3 II.
4 BACKGROUND

5 Mercury insured Ms. Garcia with an automobile policy that
6 offered her UIM benefits of up to \$100,000 per accident. On
7 October 28, 2010, Ms. Garcia was in an automobile accident with
8 a third party in Las Vegas. She was not at fault for the
9 accident. The other driver's liability insurance policy had a
10 bodily injury liability limit of \$15,000.

11 Ms. Garcia did not report the accident to Mercury
12 immediately. She waited almost a year, and reported the claim
13 to Mercury on September 12, 2011, through her attorney. Mercury
14 promptly opened a claim, assigned it claim number NVC17654, and
15 sent a letter to counsel requesting medical records and
16 information in support of the claim.

17 Ms. Garcia sent a letter the same day with a set of CDs
18 including some medical records and information regarding the
19 damage to her car. The records were incomplete, lacking billing
20 information for some treating providers. The total amount of
21 billing presented in the records Ms. Garcia provided Mercury was
22 less than \$5,000.

23 Mercury continued to request medical billing and treatment
24 records. It also requested, and obtained, a recorded statement

1 from Ms. Garcia on November 21, 2011. In her statement, Ms.
2 Garcia noted she would soon see a neurologist for her ongoing
3 complaints of dizziness and memory problems.

4 And then...silence. Mercury heard nothing further from Ms.
5 Garcia regarding her claim. It called counsel in December to
6 discuss the claim, but never received a return call. It sent a
7 letter on March 16, 2012, asking for additional medical
8 treatment and billing records, as well as signed medical record
9 release authorizations.

10 Mercury sent this same letter monthly from March 16, 2012
11 through November of 2012. It sent at least one via certified
12 mail to confirm that they were being received. Starting
13 December 14, 2012, it sent the same demand accompanied by a cite
14 to the policy's language requiring the cooperation of the
15 insured in the handling and investigation of a claim.

16 Mercury sent this updated letter monthly through September
17 27, 2013. Finally, on October 28, 2013, Mercury sent a letter
18 to Ms. Garcia noting it would close the claim as it had been
19 nearly two years of silence with no new information. With no
20 response, Mercury closed the claim.

21 The claim laid closed and dormant for nearly two and a half
22 years thereafter, when suddenly Ms. Garcia filed suit against
23 Mercury.
24

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III.
STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Mercury Casualty Company insured Lourdes Garcia under policy number NVA0012638 with a UIM line of coverage limit of \$100,000¹.

2. The policy contains a cooperation clause that reads as follows:

**"YOUR DUTIES
WHAT YOU MUST DO IN CASE OF AN ACCIDENT OR LOSS**

...
A person claiming coverage must:
1. cooperate with **us** in any matter concerning a claim or lawsuit;
2. provide any written proof of loss **we** may reasonably require;
...
9. authorize **us** to obtain medical and other records as often as reasonably necessary.²"

3. The policy also contains a provision requiring full compliance with the policy's terms before suit may commence:

"We may not be sued unless there is full compliance with all the terms of this policy.³"

4. Ms. Garcia reported a claim on September 10, 2011, arising from an automobile accident on October 22, 2010⁴.

¹ Exhibit A, policy; Declaration of Lucy Collins, ¶3

² Exhibit A, internally paginated page 3.

³ Exhibit A, internally paginated page 21.

⁴ Exhibit B, notice of loss sheet; Exhibit C, letter from Flanagan, Declaration of Lucy Collins, ¶¶4-5

5. Mercury opened claim number NVC17654, and sent a letter requesting all supporting documentation from Mr. Garcia for her claim⁵.

6. Ms. Garcia sent a letter with medical treatment and billing records on September 12, 2011, with treatment records totaling \$4,245.00⁶.

7. On November 21, 2011, Mercury took the recorded statement of Lourdes Garcia, in which she stated that she would soon see a neurologist for treatment from the accident⁷.

8. After hearing nothing in response to a request for more information, Mercury sent Ms. Garcia's counsel a letter dated December 14, 2011, requesting a call⁸.

9. Receiving no response to this letter, Mercury sent Mr. Flanagan a letter dated March 16, 2012, requesting additional medical records and a signed medical record release authorization⁹.

10. Mercury continued sending letters once a month to Ms. Garcia requesting the same information. It did not received a response to any of the letters sent from April 16, 2012, through October 15, 2012¹⁰.

⁵ Exhibit D, Opening Letter; Declaration of Lucy Collins, ¶6

⁶ Exhibit E, September 12, 2011 Letter from Sean Flannagan; Declaration of Lucy Collins, ¶¶7-8

⁷ Exhibit F, recorded statement summary; Declaration of Lucy Collins, ¶9

⁸ Exhibit G, letter dated 12/14/11; Declaration of Lucy Collins, ¶10

⁹ Exhibit H, letter dated 3/16/12; Declaration of Lucy Collins, ¶11

¹⁰ Exhibit I, letter dated 4/16/12; Exhibit J, letter dated 6/15/12; Exhibit K, letter dated 7/16/12; Exhibit L, letter dated 8/16/12; Exhibit M, letter

1 11. On November 15, 2012, Mercury sent a letter requesting
2 the same information, but also quoted from the cooperation
3 clause. It sent the letter via certified mail as well¹¹.

4 12. Neither Ms. Garcia nor her counsel responded to the
5 November 15, 2012, letter¹².

6 13. Mercury sent the same letter again on January 14,
7 2013, February 14, 2013, and March 13, 2013, via certified mail
8 to Ms. Garcia's counsel. There was no response to any of these
9 letters¹³.

10 14. On May 17, 2013, Mercury sent a letter informing Ms.
11 Garcia of the assignment of a new adjuster, but also requesting
12 the same information that it had been requesting for over a
13 year¹⁴.

14 15. Receiving no response, Mercury sent letters requesting
15 the same information again on June 19, 2013, July 23, 2013,
16 August 30, 2013, and September 27, 2013. Again, neither Ms.
17 Garcia nor her counsel responded to any of these letters¹⁵.

18
19
20
21 dated 9/14/12; Exhibit N, letter dated 10/15/12; Declaration of Lucy Collins, ¶¶12-17

22 ¹¹ Exhibit O, letter dated 11/15/12; Declaration of Lucy Collins, ¶X9

23 ¹² Declaration of Lucy Collins, ¶19

24 ¹³ Exhibit P, letter dated 1/14/13; Exhibit Q, letter dated 2/14/13; Exhibit R, letter dated 3/13/13; Declaration of Lucy Collins, ¶¶20-22

¹⁴ Exhibit S, letter dated 5/17/13; Declaration of Lucy Collins, ¶23

¹⁵ Exhibit T, letter dated 6/19/13; Exhibit U, letter dated 7/23/13; Exhibit V, letter dated 8/30/13; Exhibit W, letter dated 9/27/13; Declaration of Lucy Collins, ¶¶24-27

IV.

LEGAL ANALYSIS AND DISCUSSION

¹⁸ Declaration of Lucy Collins, ¶30

Irrelevant factual disputes cannot create a triable issue of fact, and a failure of an essential element of a claim renders all other facts immaterial. Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir.1996). The party opposing summary judgment cannot simply rely on the pled allegations in the complaint, but must instead affirmatively set forth facts demonstrating the existence of a triable issue of fact. Garvey v. Clark Co., 91 Nev. 127, 130 (1978).

B. Issue 1: Ms. Garcia's Failure To Respond To Two Years Of Requests By Mercury Violated The Cooperation Clause In Her Policy

Most auto insurance policies, including Ms. Garcia's, include a provision mandating the insured cooperate with the insurer's investigation of their claims. Such "cooperation clauses" are routinely held to be conditions precedent that must be strictly adhered to by insured, so long as they are unambiguous. Similarly, these policies also contain provisions that require an insured to comply with all policy terms before they can file suit against an insurer. These "suits against us" provisions have been upheld in Nevada, and they are usually done so in conjunction with the cooperation clause.

Ms. Garcia's failure to respond to Mercury's efforts over a two year period to obtain additional records and signed authorizations constitutes a breach of the cooperation clause. That she sued Mercury after failing to comply with the policy in

1 this manner constitutes a further violation of the terms of the
2 policy related to the suits against us provision.

3
4 **1. Ms. Garcia breached the cooperation clause.**

5
6 When an insured fails to comply with an unambiguous
7 condition precedent in the at-issue policy, coverage will be
8 precluded as a matter of law regardless of the existence of any
9 prejudice to the insurer. *Las Vegas Star Taxi, Inc. v. St. Paul*
10 *Fire & Marine Ins. Co.*, 714 P.2d 562, 562-64 (Nev. 1986) [*"Las*
11 *Vegas Star"*]; *Las Vegas Metro Police Dep't v. Coregis Ins. Co.*,
12 256 P.3d 958, 962 (Nev. 2011). A condition need not be styled
13 as such for it to serve as a condition precedent in a policy.
14 *Id.* at 562-63. Cooperation clauses in automobile policies have
15 been upheld as unambiguous. *Baker v. Hartford Underwriters Ins.*
16 *Co.*, 2015 WL 133790 (D.Nev. 2015) [*"Baker"*]. Further, they have
17 been interpreted as a condition precedent. *Ibid.*; *Green v.*
18 *American Family Insurance*, 2016 WL 1170992 (D.Nev.
19 2016) [*"Green"*]; *Holland v. State Farm Mut. Auto. Ins. Co.*, 2014
20 WL 1268712 (D.Nev. 2014) [*"Holland"*]; *Schwartz v. State Farm Mut.*
21 *Auto. Ins. Co.*, 2009 WL 2197370 (D.Nev. 2009) [*"Schwartz"*]. The
22 failure of an insured to respond to repeated requests by an
23 insurer for information in support of his claim constitutes a
24 violation of the cooperation clause. *Valentine v. State Farm*

1 *Mut. Auto. Ins. Co.*, 105 F.Supp.3d 1176, 1182-1183 (D.Nev. 2015)
 2 [insured's failure to provide all pre-loss records over a period
 3 of several months violated cooperation clause, warranting
 4 summary judgment]; *Green, supra*, at *5-6[failure of insured to
 5 provide insurer-requested information over a period of a year
 6 and a half violated cooperation clause];

7 Ms. Garcia violated the cooperation clause by failing to
 8 provide complete medical records and execute medical record
 9 release authorizations. The policy issued to Ms. Garcia
 10 contained a cooperation clause requiring her to provide Mercury
 11 with executed medical record releases and to cooperate and
 12 answer questions¹⁹. She did neither, despite a nearly two year
 13 long effort by Mercury to request the same²⁰. Though she provided
 14 some records early in the claim, they were incomplete²¹. That
 15 she referenced the need for a new neurology consult confirmed
 16 that there were additional records that would be generated, yet
 17 she did not provide them.

18 These failures to comply are without justification. Ms.
 19 Garcia provided no explanation for her failure to comply, nor
 20 even a request for more time or clarification. Mercury sent
 21 **eighteen letters** over a period of **twenty-three months** without

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 23
 24 ¹⁹ Facts 1, 2; Exhibit A

²⁰ Facts 8-18, Exhibits G-X

²¹ Facts 6-7, Exhibit E, Declaration of Lucy Collins ¶¶7-9

1 any response from Ms. Garcia²². It sent several letters via
2 certified mail to confirm receipt. It did what it could to
3 contact Ms. Garcia to see if she would cooperate with its
4 investigation of her claim.

5 Yet she did not respond²³. The next time that Ms. Garcia
6 actually did something relative to her claim was when she filed
7 suit against Mercury in 2016- **four years and four months** after
8 her last interaction with Mercury concerning her claim.

9 As noted by the Court in *Valentine*:

10 "It is absurd to think that an insured who fails to
11 provide her insurer with medical information critical
12 to a full and fair investigation of the insured's
13 claim should then be able to sue the insurer for
14 refusing to pay on that same claim."

15 This is the scenario before the Court in this matter. Ms.
16 Garcia spent years in silence following Mercury's request until
17 she suddenly filed this suit. She failed to give Mercury full
18 and complete medical records, and she failed to provide the
19 executed medical record release authorizations mandated under
20 the policy. This is a clear violation of the condition
21 precedent found in the cooperation clause. It is more than
22 ample justification to grant summary judgment in favor of
23 Mercury on this cause of action alone.

24 //

²² Exhibits G-X

²³ Fact 18, Declaration of Lucy Collins, ¶¶30

1 **2. Ms. Garcia cannot proceed with this action as she**
 2 **breached a condition precedent**

3 Policy provisions that preclude an insured from bringing
 4 legal action until there are is full compliance with all policy
 5 terms are valid in Nevada. *Holland, supra*, at *5; *Las Vegas*
 6 *Star, supra*, 102 Nev. at 12; *Valentine, supra*, 105 F.Supp.3d at
 7 1183. Nevada courts have applied this rule where the insured
 8 fails to comply with the cooperation clause in a policy. *Ibid*.

9 Ms. Garcia's failure to respond to Mercury multiple
 10 requests for information constituted a failure to comply with
 11 the policy's condition mandating cooperation. The policy
 12 contains a provision precluding suits against Mercury unless the
 13 insured fully complies with the policy's terms²⁴. This provision
 14 mirrors those found in the policies of State Farm and The
 15 Hartford analyzed in *Holland, Valentine, Schwartz, and Baker*.
 16 This same provision is valid and enforceable in Nevada, and it
 17 is triggered where an insured fails to cooperate in the
 18 investigation of his claim. While the failure to comply with
 19 the cooperation condition is itself fatal, the suits against us
 20 provision also bars this action.

21 Mercury gave Ms. Garcia two years to provide it with
 22 additional information after her recorded statement. She failed
 23

24 ²⁴ Facts 1-2, Exhibit A.

1 to respond, let alone comply with the terms of the policy²⁵.
 2 Without such compliance, Ms. Garcia breached a condition
 3 precedent in her policy. Such a breach is fatal to her lawsuit.
 4 For these reasons, the Court should grant summary judgment in
 5 Mercury's favor on plaintiff's cause of action for breach of
 6 contract.

7 **D. Issue 2: Mercury's Closing Of The Claim Without**
 8 **Payment Was Not An Act Of Bad Faith**

9 To establish bad faith, a plaintiff must demonstrate that
 10 the insurer denied a claim unreasonably, and the insurer knew it
 11 lacked a reasonable basis to do so, or acted with reckless
 12 disregard as to the unreasonableness of the denial²⁶. The
 13 additional requirement that the insurer consciously understood
 14 the unreasonableness of its conduct is a subjective standard,
 15 requiring evidence the insurer knowingly acted unreasonably²⁷.
 16 An insurer that closes a claim without payment as a result of an
 17 insured's failure to communicate and cooperate such that the
 18 insurer cannot fully evaluate the claim does not constitute an
 19 actual denial of the claim. see *Valentine, supra*, 105 F.Supp.3d
 20 at 1183.

21
 22
 23 ²⁵ Exhibits G-X

24 ²⁶ *Powers v. United Services Auto Ass'n*, 114 Nev. 690, 702-703 (1998); see
 also *Schumacher v. State Farm Fire & Cas. Co.*, 467 F.Supp.2d 1090, 1096 (D.
 Nev. 2006) [*"Schumacher"*].

²⁷ *Ibid*.

1 There was no unreasonable denial of Ms. Garcia's claim,
 2 precluding a finding of bad faith against Mercury. As a
 3 practical matter, Mercury was never able to either accept or
 4 deny Ms. Garcia's claim as she failed to provide it with
 5 sufficient information to do so²⁸. This is not a scenario where
 6 the insurer had more than ample information to decide a claim,
 7 but instead one where the insured's own recorded statement
 8 demonstrated that future treatment would occur beyond the last
 9 date on which she provided records.

10 And the records that the insured provided were incomplete,
 11 lacking billing information for all providers save one²⁹. While
 12 Mercury tried to remedy this problem by requesting signed
 13 authorizations and additional information directly from Ms.
 14 Garcia, she failed to respond to any one of its inquiries. It
 15 gave her two years to respond before it closed the claim.

16 This is not the conduct of an insurer acting in bad faith.
 17 As noted in *Valentine*, an insurer that cannot evaluate a claim
 18 due to the non-cooperation of its insured does not actively deny
 19 the same. Consistent with *Schumacher*, an insurer that does not
 20 actually deny a claim cannot be held liable for bad faith. And
 21 objectively, where an insured does not comply in the slightest
 22
 23

24 ²⁸ Fact 17, Declaration of Lucy Collins, ¶¶29-30

²⁹ Facts 6-7, Declaration of Lucy Collins, ¶¶7-9

1 in providing information, as with Ms. Garcia, it is not an
2 unreasonable act to close the claim without payment.

3 For these reasons, the Court should grant summary judgment
4 in Mercury's favor on the cause of action for bad faith.

5 **E. Issue 3: There Is No Basis For Ms. Garcia To Seek**
6 **Attorney's Fees As Damages**

7 There is no authority for the proposition that attorneys'
8 fees and costs are a form of compensable damages under a theory
9 of breach of the covenant of good faith and fair dealing. Ms.
10 Garcia will not be able to cite to any Nevada authority to the
11 contrary, nor any authority in the Circuit analyzing Nevada law.

12 In fact, the sole authority in the Circuit analyzing Nevada
13 law on this issue runs in favor of Mercury. The Ninth Circuit
14 Court of Appeal reversed a district of Nevada court's decision
15 awarding the same as damages to a plaintiff³⁰. In *Merrick*, the
16 rationale behind the lower court's award of such fees was based
17 on a misinterpretation of *Farmers Home Mutual Ins. Co. v.*
18 *Fiscus*, 102 Nev. 371 (1986), a Nevada Supreme Court decision,
19 concluding that the fee shifting provision of NRS 18.010 was
20 immediately triggered by a finding of bad faith³¹.

21 The Court concluded this was an erroneous reading of the
22 same, noting that the Nevada Supreme Court ruling expressly

23 _____
24 ³⁰ *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1018 (9th Cir.
2007) [*"Merrick"*]

³¹ *Id.* at 1018.

1 failed to draw this conclusion³². *Merrick* noted that four months
 2 after *Fiscus* was decided, the Supreme Court of Nevada, in
 3 another bad faith insurance case, determined that an award of
 4 fees would only have been possible pursuant to NRS 18.010³³. The
 5 Ninth Circuit concluded by noting that neither it nor the Nevada
 6 Supreme Court could not have created a categorical rule
 7 permitting the recovery of attorney's fees as damages
 8 automatically on a finding of bad faith because Nevada law
 9 prohibits courts from expanding or altering legislative rules
 10 for fee-shifting³⁴.

11 Interpreting *Merrick* and the multitude of cited Nevada
 12 authorities in the same, the Ninth Circuit correctly concluded
 13 that there is no Nevada authority that permits an award of fees
 14 and costs as damages for a breach of the covenant of good faith
 15 and fair dealing. Though the provisions of NRS 18.010 might
 16 permit a request pursuant to that statute following a verdict in
 17 this matter, this does not render such evidence relevant for
 18 purposes of any element of this cause of action.

19 Ms. Garcia will be unable to cite any controlling Nevada
 20 authority that authorizes such fees and costs as damages under
 21 either cause of action. For these reasons, the Court should
 22

23 ³² *Id.*

24 ³³ *Id.* (citing *Am Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 729 P.2d 1352 (1986).)

³⁴ *Id.*

1 enter judgment in favor of Mercury as to any claim of attorneys'
2 fees and costs as damages for the cause of action of bad faith.

3 **F. Issue 4: There Is No Evidence That Mercury Acted With**
4 **Malice, Fraud, Or Oppression In Handling Ms. Garcia's Claim**

5 Proof of bad faith does not by itself warrant the
6 imposition of punitive damages³⁵. Punitive damages may be
7 awarded against a party where there is clear and convincing
8 evidence of malice, fraud, or oppression³⁶. These three elements
9 are defined in the common law in a manner nearly identical to
10 that in [NRS 42.001](#):

11 "In actions brought against an insurer who acts in bad
12 faith regarding its obligations to provide insurance
13 coverage," the common law definitions of oppression,
14 fraud and malice apply. NRS § 42.005(5). "Oppression
15 occurs when the plaintiff is subjected to 'cruel and
16 unjust hardship in conscious disregard of his
17 rights.'" *Desert Palace*, *5 (quoting *Ainsworth v.*
18 *Combined Ins. Co. of America*, 105 Nev. 237, 774 P.2d
19 1003, 1012 (1989)). "Malice refers to conduct which is
20 intended to injure a person or conduct with a
21 conscious or deliberate disregard of the rights or
22 safety of others.³⁷"

23 Mercury did not engage in any conduct that would rise to
24 the level of malice, fraud, or oppression warranting an award of
punitive damages. Mercury promptly opened a claim for Ms.
Garcia once reported, and it contacted her for information

³⁵ [United States Fidelity v. Peterson](#), 91 Nev. 617, 620 (1975).

³⁶ [NRS 42.005](#).

³⁷ [Wallace v. USAA Life General Agency, Inc.](#), 862 F.Supp.2d 1062, 1072 (D.Nev. 2012), see also *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 512-513 (1989)

1 regarding and supporting her claim³⁸. After reviewing the
 2 incomplete records she provided and her recorded statement, it
 3 was clear that the provided records were both incomplete and
 4 that she would have to provide either the additional records or
 5 an authorization so that Mercury could obtain the records by
 6 itself³⁹. Mercury requested such information for roughly two
 7 years before it finally closed the claim without payment. It
 8 sent near-monthly requests for the information, sometimes via
 9 certified mail, in an attempt to get Ms. Garcia or her counsel
 10 to respond. It heard nothing, and it simply closed the claim
 11 thereafter.

12 This is not conduct that demonstrates actions by Mercury to
 13 harm Ms. Garcia. To the contrary, they are the actions of an
 14 insurer giving every opportunity to its insured to substantiate
 15 her claim under the policy. There was nothing misleading in the
 16 materials sent by Mercury to Ms. Garcia, nor anything
 17 demonstrating an effort by Mercury to burden her in providing
 18 responses. There is nothing objectively oppressive or malicious
 19 in requesting medical record release authorizations to obtain
 20 records in support of an insured's claim.

21 Ms. Garcia will be unable to point to any evidence to
 22 support her claim for punitive damages, let alone clear and
 23

24 ³⁸ Facts 4-5, Exhibits B-D, Declaration of Lucy Collins, ¶¶4-6

³⁹ Facts 6-8

1 convincing evidence. This standard is one of the most onerous
2 imposed in civil proceedings, and it applies equally when
3 evaluating a dispositive motion as it does at the time of trial.

4 **V.**
5 **CONCLUSION**

6 Ms. Garcia inexplicably failed to respond to Mercury's
7 nearly two year long effort to request signed authorizations to
8 obtain medical records, as well as the records themselves, that
9 would support her claim under her policy. Despite more than
10 adequate time and warning that it would close the claim, Ms.
11 Garcia filed suit against Mercury for allegedly breaching its
12 contract with her.

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1 Yet it was her breach of a condition precedent, followed by
2 her breach of the suits against us provision, that warrants
3 disposition of this matter on this motion. She cannot dispute
4 the factual history of the claim, nor the contents of the
5 policy. For these reasons, the Court should enter summary
6 judgment in favor of Mercury as to all causes of action.

7 DATED this 21st day of February, 2017.

8 **RANALLI ZANIEL FOWLER & MORAN, LLC**

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10
11 By /s/Benjamin J. Carman
12 BENJAMIN J. CARMAN, ESQ.
13 Attorneys for Defendant
14 Mercury Casualty Company
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CERTIFICATE VIA CM/ECF

Pursuant to FRCP 5, I hereby certify that I am an employee of RANALLI ZANIEL FOWLER & MORAN, LLC, and that on the 21st day of February, 2017, I caused to be served via CM/ECF a true and correct copy of the document described herein.

Document Served: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Person(s) Served:

Sean Flanagan, Esq.
FLANAGAN, LTD.
10223 Rarity Ave.
Las Vegas, Nevada 89135
Attorney for Plaintiff

_____/s/Benjamin J. Carman_____

An EMPLOYEE OF
RANALLI ZANIEL FOWLER & MORAN, LLC

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